STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2001-841

January 8, 2002

BANGOR HYDRO-ELECTRIC COMPANY
Request for Approval of Reorganization and
Affiliated Interest Transactions with
Emera Energy Services, Inc.

ORDER

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

We conclude that Maine's Restructuring Act does not prohibit Bangor Hydro-Electric Company (BHE) or its corporate parent, Emera, Inc., from being affiliated with a competitive electricity provider (CEP) that operates in Maine.

II. BACKGROUND

On December 5, 2001, BHE filed for Commission approval of a reorganization pursuant to 35-A M.R.S.A. § 708. The filing involves the creation of Emera Energy Services (EES), a subsidiary of BHE's corporate parent, Emera, Inc. EES would be a licensed CEP in Maine.

During a case conference on December 13, 2001, the Public Advocate raised the issue of whether 35-A M.R.S.A. § 3206-A(2) prohibits BHE and Emera from being affiliated with a CEP in Maine. The parties agreed to separately brief this legal issue as a threshold matter in this proceeding.

III. POSITIONS OF PARTIES

A. Public Advocate

The Public Advocate argues that the plain language of section 3206-A(2) prohibits the creation of EES.[1] The section, according to the Public Advocate, specifically prohibits Emera, Inc., which has purchased BHE's stock, from now creating an affiliate that would sell electricity to retail consumers in Maine. The Public Advocate asserts that the section reflects the Legislature's concern about holding companies that own both a transmission and distribution (T&D) utility and a competitive provider that operate in Maine. The Public Advocate disputes BHE's argument that a logical

[1] The Public Advocate indicated that Competitive Energy Services, LLC and the Maine Electric Consumer Cooperative join in the arguments presented in his brief.

distinction exists upon which the Legislature would differentiate among pre-existing affiliated providers and those created after a merger with a T&D utility.

B. Bangor Hydro-Electric

BHE states that section 3206-A(2) does not prohibit the creation of EES, arguing that the section applies only to an entity that has an affiliated competitive provider at the time it purchases a Maine T&D utility. BHE argues that the prohibition in section 3206-A(2) was intended to be narrow in application, addressing only the circumstance of an entity with a marketing affiliate attempting to gain a competitive advantage by purchasing a T&D utility. BHE contends that the Public Advocate's interpretation is overly broad and would negate other provisions of the Act that clearly allow T&D utilities in Maine to have a marketing affiliate under some circumstances.

IV. DISCUSSION

Section 3206-A(2) states in relevant part:

> **2. Prohibition, divestiture**. If, after the effective date of this section, 10% or more of the stock of an investor-owned transmission and distribution utility is purchased by an entity:
>
> **A.** The purchasing entity and any related entity may not sell or offer for sale generation service to any retail consumer of electric energy in this State; and
>
> **B.** If, in an adjudicatory proceeding, the commission determines that an affiliated competitive provider obtains an unfair market advantage as a result of the purchase, the commission shall order the investor-owned transmission and distribution utility to divest the affiliated competitive provider.

The language of this provision is not clear as to its precise application. Subsection 2(A) and 2(B) appear contradictory. The section is implicated upon an entity's purchase of the stock of a T&D utility and could apply in three circumstances:

- Purchaser has a pre-existing marketing affiliate at the time of the acquisition.
- Purchaser creates a marketing affiliate subsequent to the acquisition.
- T&D utility has a marketing affiliate at the time of the acquisition.

The parties appear to agree that the subsection 2(A) prohibition would apply in the first circumstance, while subsection 2(B) implies that a T&D utility may maintain a pre-existing marketing affiliate subject to subsequent divestiture order by the Commission. The issue is thus whether the section 3206-A(2) prohibition applies in the second circumstance in which the purchasing entity, as in the current case, creates an affiliated competitive provider after the acquisition of a T&D utility.

Because the language is not clear on this point, we consider the possible legislative intent or purpose underlying section 3206-A(2). As suggested by BHE, the Legislature could have had a rational concern regarding corporations with an established marketing affiliate presence in Maine seeking to gain a competitive advantage through the purchase of a Maine T&D utility. To avoid the potential negative impact on Maine's retail electricity market, the Legislature could have logically decided to prohibit a pre-existing marketing affiliate of a purchasing entity from continuing retail electricity sales in Maine after the acquisition.

In light of the ambiguity in the language of the section as it applies to the circumstances presented here and the existence of a logical rationale for a narrow interpretation of the marketing prohibition, we adopt the less restrictive interpretation as more consistent with the overall competitive goals of the Restructuring Act. The Restructuring Act does not have an outright prohibition against T&D utility marketing affiliates; rather, the Act specifically allows T&D utilities to have marketing affiliates in some circumstances subject to strict oversight by the Commission. This reveals a legislative view that the Commission has adequate authority to police and remedy market abuses or unfair advantages that might result from T&D utility affiliation. Thus, we find it appropriate to interpret the Act as not prohibiting the creation of an additional competitor when, as here, the language of the Act does not clearly mandate such a result.

For these reasons, we conclude that EES is not prohibited by section 3206-A(2) from selling to retail customers in Maine.

Dated at Augusta, Maine, this 8th day of January, 2002.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.